STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY THOMAS MARSILI,

Defendant-Appellant.

UNPUBLISHED
September 19, 2006

No. 261419
Macomb Circuit Court
LC No. 04-003901-FC

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced, as a fourth habitual offender, MCL 769.12, to 16 to 40 years in prison for his armed robbery conviction, and two years in prison for his felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied his constitutional right to the effective assistance of counsel. We disagree.

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law, which this Court reviews, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* A trial counsel's decisions concerning which questions to ask a witness, what evidence to present, and whether to call or question witnesses are presumed to be sound trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Failure to present additional evidence only constitutes ineffective assistance of counsel when it deprives the defendant of a substantial defense that would have affected the outcome of the proceedings. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Furthermore,

trial counsel is not ineffective for failing to make a futile motion or argument. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). Finally, the test applied to a claim of ineffective assistance of trial counsel also applies to a claim of ineffective assistance of appellate counsel. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

We reject defendant's argument that he was denied his constitutional right to the effective assistance of counsel when his trial counsel failed to object to the photo lineup and Joanne Goss's subsequent preliminary examination and in-court identifications of defendant. "If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). A photographic identification procedure can be so suggestive as to deprive the defendant of due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). Factors to consider when determining whether a photo lineup is unduly suggestive include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *People v Kurylczyk*, 443 Mich 289, 306, 318; 505 NW2d 528 (1993)(GRIFFIN, J.), quoting *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972). The display of a single photograph combined with an indication that the person depicted has been arrested for the offense can be unduly suggestive. *Gray, supra* at 111.

Moreover, a preliminary examination identification can be impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 287-288; 545 NW2d 18 (1996). In the dissenting opinion in *People v Solomon*, 47 Mich App 208, 216-221; 209 NW2d 257 (1973), which was adopted by our Supreme Court in *People v Solomon*, 391 Mich 767; 214 NW2d 60 (1974), Judge Lesinski held that a preliminary examination is a pretrial identification procedure that can be impermissibly suggestive because it is a setting where the accused is presented to the witness as one whom the state suspects as being guilty. Judge Lesinski noted that when determining if a preliminary examination confrontation was impermissibly suggestive, a court should consider whether the police told the identifying witness they had the right person in custody, the time between the incident and the confrontation, and the witness' ability to give identifying characteristics. *Solomon, supra* at 216-221. Judge Lesinski suggested that the case be remanded so that the trial court could make the determination of whether the preliminary examination at hand amounted to an impermissibly suggestive procedure because it had been suggested that the police told the defendant that they had the right person in custody, and the preliminary examination took place two and one-half years after the incident in question. *Id*. In *McElhany, supra* at 287-288, this Court held that a preliminary examination was not impermissibly suggestive where the victim had a good opportunity to view her attacker during the incident in question and the preliminary examination took place only two months after the incident in question.

Here, Goss, the 7-11 store employee who was robbed at gunpoint, stated that defendant was in the store for approximately 15 minutes, and thus, she had a good opportunity to view defendant and saw his face. Moreover, even though Goss stated that she was frightened at the time defendant pulled out his gun, she also noted that defendant only had his gun out for half of the time that he spent in the store. Furthermore, Goss stated that defendant's face was a face that she could not forget, and she told officer Keith Keitz that she was 100 percent sure that she would be able to identify that man who robbed the store. Additionally, the photo lineup was conducted a mere five days after the incident took place. Furthermore, Keitz testified that Goss immediately identified defendant without hesitation as the man who robbed the store. In fact, Keitz noted that in his six years of experience, Goss's identification of defendant at the photo lineup was the quickest he has ever seen anyone identify a suspect. Finally, Keitz stated that he did not tell Goss that the individual who robbed the store would be in the photo lineup. Therefore, even though defendant's picture was one of only two pictures in the photo lineup that depicted an individual with a mustache and a "red and beaten" face, and defendant was the only individual depicted who had "close-shaved hair," we conclude that the photo lineup was not unduly suggestive. *Kurylczyk*, *supra* at 306. We have reviewed a picture of the photo lineup, and it is more than fair and not unduly suggestive.

Furthermore, as discussed, *supra*, Goss had a good opportunity to view defendant during the incident in question. Additionally, the preliminary examination took place only a month after the incident in question, and it took place after Goss had already identified defendant in the photo lineup. Therefore, we conclude that Goss's identification of defendant during the preliminary examination was not unduly suggestive. Accordingly, Goss's in-court identification of defendant was proper, and thus, any objection by defense counsel would have been futile. Therefore, defendant was not denied his constitutional right to the effective assistance of counsel when his trial counsel failed to object to the photo lineup identification, the preliminary examination identification, and Goss's subsequent in-court identification of defendant.

Likewise, we reject defendant's argument that he was denied his constitutional right to the effective assistance of counsel when his appellate counsel failed to file a motion for a new trial before the trial court in an effort to preserve a "great weight" argument. The elements of armed robbery are: (1) an assault, and (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a specified weapon or any article used or fashioned in a manner to lead the person assaulted to reasonably believe it to be a dangerous weapon. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004); MCL 750.529. The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). In order to discount testimony that supports a verdict and grant a new trial, the testimony must either contradict indisputable physical facts, or be so patently incredible or inherently implausible that a reasonable juror could not believe it. *Id*. at 643-644. Here, the evidence clearly established that defendant pointed a gun at Goss, demanded that she give him cigarettes and all the money in the till, and subsequently left the store with $33 and five cartons of cigarettes. Moreover, even though Goss's trial testimony regarding how long defendant was in the store was contradictory to her preliminary examination testimony, we must afford deference to the trier of fact's special

opportunity and ability to determine the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). Therefore, the jury's verdict was not against the great weight of the evidence, and thus, a motion for a new trial in order to preserve a great weight argument would have been futile. Accordingly, defendant was not denied his constitutional right to the effective assistance of counsel when his appellate counsel failed to file a motion for a new trial before the trial court in an effort to preserve a "great weight" argument.

Finally, we also reject defendant's argument that he was denied his constitutional right to the effective assistance of counsel when his trial counsel failed to conduct discovery or present a meaningful defense. Here, defense counsel defended his client by using Goss's arrest scene statements and preliminary examination testimony to impeach Goss and attack her identification of defendant. Given that, as discussed above, the prosecution presented evidence that established that defendant pointed a gun at Goss, demanded that she give him cigarettes and all the money in the till, and subsequently left the store with $33 and five cartons of cigarettes, we conclude that defense counsel's defense was sound trial strategy and his actions in this regard did not fall below an objective standard of reasonableness. Furthermore, defendant has failed to provide what evidence and defenses his defense counsel should have presented and, accordingly, has failed to provide how such evidence or defenses would have affected the outcome of the proceedings. Therefore, defendant's claim that he was denied the effective assistance of counsel because defense counsel allegedly failed to conduct discovery or present a meaningful defense must fail.

Defendant next argues that the trial court committed plain error requiring reversal when it instructed the jury that it could find defendant "guilty of all of the crimes or not guilty." We disagree. Defendant failed to properly preserve this argument for appeal by objecting to the instruction at trial. *People v McCrady*, 244 Mich App 27, 30; 624 NW2d 761 (2000). We review unpreserved instructional error claims for plain error which affect a defendant's substantial rights, and such claims merit reversal only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763, 773; 597 NW2d 130 (1999).

A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. *People v Hawthorne*, 265 Mich App 47, 57; 692 NW2d 879 (2005), rev'd on other grounds 474 Mich 174 (2006). A trial court must clearly present the case to the jurors and instruct them on the applicable law. *Id*. at 51. Jury instructions must therefore include all the elements of the charged offenses and any material issues, defenses, and theories, which are supported by the evidence. *Id*. Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly represented to the jury the issues to be tried. *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994).

Here, in pertinent part, the trial judge instructed the jury:

> The defendant is charged with two counts, that is, with the crimes of armed robbery and felony[-]firearm. These are separate crimes and the prosecutor is charging that the defendant committed both of them. You must consider each crime separately in light of all the evidence in the case. You may find the defendant guilty of all of the crimes or not guilty.

The prosecutor subsequently properly stated that CJI2d 3.20, in pertinent part, should have read, "you may find the defendant guilty of all these crimes, any one, or not guilty." The trial court acknowledged that the instruction should have been read as the prosecutor suggested, but noted that it would leave the aforementioned instruction as is because, given the verdict form, the instruction was "clear enough." Given that the jury verdict form listed each of the charged crimes separately and gave options of guilty or not guilty for each charge, and the fact that the trial judge instructed the jury that it was to consider each of the crimes charged against defendant separately, we conclude that the jury could not have interpreted the trial judge's questioned instruction to mean that it could not find defendant guilty of only one of the charged crimes. Therefore, we conclude that the jury instructions, viewed as a whole, sufficiently protected defendant's rights and fairly represented to the jury the issues to be tried, and thus, the trial court did not commit plain error.

Defendant's final issue on appeal is that the prejudicial effect of the cumulative errors in this case mandate reversal and remand for a new trial. We disagree. We review this issue to determine if the combination of alleged errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial. *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002).

The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the effect of the errors must have been seriously prejudicial to warrant a finding that the defendant was denied a fair trial. *LeBlanc, supra* at 591. Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

As indicated above, defendant has not established the occurrence of any errors, except for possibly the claimed instructional error. Therefore, assuming one error, there can be no cumulative effect of errors that would merit reversal. Reversal is unwarranted.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Bill Schuette